IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 844 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MAHENDRAKUMAR CHHOTALAL SHAH

Versus

DEVIBEN KAILASHNATH SINGHANIA

Appearance:

Mr. S.M. Shah, for, MR KETAN D SHAH for Petitioner

Mr.M.G. Gandhi for MR RAJESH M AGRAWAL

for Respondent

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 04/05/2001

C.A.V. JUDGEMENT

1. The petitioner (original plaintiff), by filing this Civil Revision Application under Section 29(2) of the Bombay Rents (Hotel & Lodging House Rates Control) Act, 1947 ('Act' for short), has challenged the judgment and order dated August 18, 2000 passed by the Appellate Bench of the Small Causes Court, Ahmedabad, in Appeal From Order No.20 of 2000, whereby, the Appellate Bench, has allowed the appeal filed by the defendant with costs and vacated the order dated February 10, 2000, passed by the learned Judge, Court No.4, Small Causes Court, Ahmedabad, below application Exh.5 in H.R.P. Suit No.1399 of 1999, granting interim injunction in favour of the petitioner-plaintiff restraining the defendant from

dispossessing the plaintiff from the shop situated in the upper-ground floor bearing Shop No.4, in Sun Plaza Complex, Navrangpura, Ahmedabad. The Appellate Bench, while allowing the appeal filed by the respondent-defendant, passed the following order:

"1. Appeal is allowed with costs.
2. The order of the trial court dated 10.2.2000 below Exh.5 is hereby set aside.
3. The respondent-plaintiff is directed to remove his garments and other articles pertaining to his alleged business from the suit premises and hand over the vacant physical possession along with the key to the plaintiff (sic-defendant). "

2. The brief facts leading to filing of the present Civil Revision Application are as under:

3. As per the averments made in the plaint of H.R.P. Suit No.1399 of 1999, the petitioner (original plaintiff) is carrying on business of ready-made garments in whole-sale and retail in the trade name of 'All Wear Creations' and was issued Sales Tax No.12841191, dated August 25, 1988. According to the petitioner, he started selling ready-made garments in Shop No.4, upper ground floor, Sun Plaza Complex, Navrangpura, Ahmedabad, (hereinafter referred to as 'suit shop' for the sake of brevity) from November 13, 1999. According to the plaintiff, the suit shop was let out to him by the respondent on November 10, 1999 on a monthly rent of Rs.4000/- excluding liability to pay tax, which was payable by the landlord. The petitioner claimed that he had paid advance rent of one month commencing from November 10, 1999 to December 9, 1999, but the respondent did not issue receipt of the amount of advance rent and had assured that she would subsequently issue receipt. According to the petitioner, the said amount was received by the respondent in presence of witnesses. It is the case of the petitioner that, after the shop was let out to him on November 10,999, he started his business in the suit shop on November 13, 1999 and the opening ceremony was also held on the same day. As per the averments made in the plaint, the husband of the respondent, Kailashnath Radhavallabh Singhania, was previously carrying on business of ready-made garments in the name of 'Aakashkrupa' and the petitioner was helping the husband of the respondent in the business of ready-made garments as well as supplying garments to him. As per the case of the petitioner, the husband of the respondent had not made payments of huge amount for purchase of ready-made garments from the petitioner and, therefore, because of

good relation between the parties, no deposit or advance rent was demanded by the respondent. As per the averments made in the plaint, the petitioner was under an apprehension that the respondent was trying to sell the suit shop by taking a huge amount and was trying to dispossess the petitioner from the suit shop since last two days before filing of the suit. According to the petitioner, the respondent, with the help of her relatives, was trying to pressurize the petitioner to vacate the premises and was giving threats to vacate the suit shop. It is also averred in the plaint that the husband of the defendant i.e. Kailashnath Radhavallabh Singhania, closed his business on September 30, 1999 and started selling the remaining stock of ready-made garments by a clearance sale from November 4, 1999, because the business was to be completely closed from November 4, 1999, and, accordingly, an advertisement was also published in a daily newspaper. Under the circumstances, the petitioner, therefore, has filed H.R.P. Suit no.1399 of 1999 against the respondent on November 21/22, 1999, for permanent injunction restraining the respondent, her relatives and agents from dispossessing the petitioner from the suit shop which was let out to him by the respondent. Along with the suit, the petitioner filed an application Exh.5 for interim injunction. The petitioner also filed an application Exh.7 for appointment of Court Commissioner for local inspection of the suit shop. The Court passed an order on the application Exh.7, and appointed Court Commissioner to carry out local inspection of the suit shop. Accordingly, the Court Commissioner inspected the suit shop on November 22, 1999, and submitted his inspection report along with the sketch of the suit shop in the lower Court.

4. On receiving summons from the Small Causes Court, the respondent appeared and filed her written statement-cum-reply Exh.16 to the application for interim injunction as well as objections against the report of the Court Commissioner and, by filing a counter claim, made prayer to the Court that the ad-interim injunction granted against her be vacated forthwith and the petitioner be, by a mandatory injunction, restrained from entering into the suit shop and be directed to remove all the goods and other articles belonging to him which were lying in the suit shop. The respondent, in her reply Exh.16, contended that it is not true that the petitioner had started retail business of selling ready-made garments in the suit shop on November 13, 1999. It was averred that the petitioner was carrying on his business at his residence situated at 9, Prakurti Apartments, Near

: H.L. College, Navrangpura, Ahmedabad, and not at the suit shop. It is averred that the family members of petitioner and respondent had developed good relation with each other for the last four years and, therefore, the petitioner was in know of the fact that the husband of the respondent was having financial difficulties, as he was not doing well in his business in the suit shop and, therefore, the husband of the respondent had sold the suit shop to one Linaben Vijaybhai Vora by agreement dated September 23, 1999. It is averred that the story about the petitioner having become tenant of the suit shop from November 9, 1999 on monthly rent of Rs.4000/and the petitioner having paid advance rent of one month, i.e from November 10, 1999 to December 10, 1999, was false and cooked up. It is further averred that, after executing the agreement to sell of the suit shop, the husband of the respondent had given an advertisement in daily newspaper, Gujarat Samachar, on November 4, 1999, that, as the business of ready-made garments in the shop 'Aakashkrupa' was to be closed, a clearance sale will begin from November 4, 1999. It is further averred that because of good family relations between the petitioner and the respondent, the petitioner used to take and keep keys of the suit shop and, in absence of respondent's husband, was taking part in the clearance sale since November 4, 1999. It is stated that the petitioner was fully aware and conversant with the business and the financial crisis of the husband of the respondent and, by taking advantage of the situation, he has made out a false story of having become tenant of the suit shop and obtained ex-parte order of appointment of Court Commissioner. It is averred that ready-made garments and other goods lying in the suit shop belonged to the husband of the respondent, which indicated that the petitioner's possession was not genuine. It is mentioned that the opening ceremony of the suit shop was not held on November 13, 1999, and the invitation card produced by the petitioner was merely a show to create evidence against the respondent and no such opening ceremony was held on November 13, 1999. The respondent, further, averred that, till today, there was a signboard of 'Aakashkrupa' at the suit shop, which was deliberately not noted by the Court Commissioner while carrying out the inspection of the suit shop and, therefore, the report of the Court Commissioner should not be accepted. The respondent, by filing counter claim in the suit filed by the petitioner, prayed for permanent injunction restraining the petitioner or his agents from entering the suit shop and for direction to the petitioner to remove his goods from the suit shop.

5. It be stated that, along with the suit, the petitioner had produced documentary evidence consisting of certificate issued by the Sales Tax Department, affidavits of Vinodbhai Maganbhai Shah, Mehulkumar Mahasukhlal Shah, Dilipbhai A. Barot and Jayeshbhai Maganlal Shah in support of his case that the petitioner was tenant of the suit shop and the opening ceremony of the suit shop was held on November 13, 1999 and the petitioner was carrying on business of ready-made garments in the name of 'Allwear Creations' in the suit shop.

6. The respondent, with her written statement Exh.16, produced certificate issued by the Sales-tax Department dated March 28, 1995, indicating that the respondent was carrying on business in the trade name of 'Aakashkrupa' in the suit shop, agreement of sale of the suit shop executed on September 23, 1999 by the respondent in favour of Linaben Vijaybhai Vora, photographs of suit shop, and affidavits of Vijaybhai R. Vora, husband of Linaben Vora, Sanjaybhai Biharilal Shah, Anilbhai Bhagwanbhai Kosti, Jagdishbhai Nandkishore Agrawal, and Jayant Somakant Mayure in support of her case that the husband of the respondent was carrying on the business in the suit shop in the trade name of 'Aakashkrupa' and no opening ceremony of Allwear Creations in the suit shop had taken place on November 13, 1999 and as the husband of the respondent was not doing well in the business of selling ready-made garments, the suit shop was sold by an agreement on September 23, 1999.

7. The learned Judge, Court No.4, Small Causes Court, Ahmedabad, after appreciating the documentary evidence produced by the parties, concluded that there was a dispute with regard to suit shop between the petitioner and the respondent and, as the report of the Court Commissioner indicated that the petitioner was in possession of the suit shop, his possession is required to be protected. The learned Judge did not accept the case of the respondent that the agreement to sell was executed in September 1999 and the respondent had accepted a cheque of Rs.51,000/- towards earnest money. The learned Judge, mainly by placing reliance on the Court Commissioner's report, held that, since the petitioner was in possession of the suit shop, his possession required to be protected til final disposal of the suit. The learned Judge, by his judgment and order dated February 10,2000, confirmed the ad-interim injunction granted earlier in terms of paragraph 15(A) of

application Exh.5.

8. The order dated February 10, 2000, passed by the learned Judge, Court No.4, Small Causes Court, Ahmedabad, below application Exh.5, in H.R.P. Suit No. 1399 of 1999, was challenged by the respondent before the Appellate Bench of the said Court by filing Appeal From Order No.20 of 2000, under order 43 Rule 1 of the Code of Civil Procedure, 1908 ('Code' for short). The Appellate Bench, on appreciation of evidence produced by the parties and the arguments advanced by the learned advocates for the respective parties, in paragraph 19, at page 18, held that the order of the trial court granting interim injunction required to be interfered with, because of the following reasons:

I. Very good relation between the plaintiff and the defendant's husband is admitted by the plaintiff.

II. It is admitted that the plaintiff was not merely supplying the goods to AAakashkrupa business of defendant's husband but the plaintiff was also helping him in the said business.

III. The defendant-appellant gave advertisement on 4.11.1999 for sale of Readymade Garments with an intention to close the business of Aakashkrupa.

IV It is not correct to say that the defendant has admitted handing over the possession by giving key. On pages 5 and 6 of the written statement Exh.16 what is stated is that due to good relations with the plaintiff and the fact that most of the Readymade goods were purchased from the plaintiff and as he was helping the business of Aakashkrupa an additional key set was given to the plaintiff for disposal of Readymade Garments. This averment does not amount to handing over possession much less as a tenant.

V. The plaintiff's witnesses except one are his near relatives.

VI. The claim is that premises was rented on 10.1.1999 and inauguration was made on 13.11.1999. There is absolutely no allegation made as to why such a close friend was not invited in the inauguration. It is not the case that inauguration was done with a simple ceremony. In fact even invitation cards were distributed. In this context argument it is the choice of the plaintiff to whom he should extend the invitation is without merits. this must be read in the light of the allegation in the plaint that huge amount was due from the defendant's husband. So, this conduct clearly shows some

ulterior motive on the part of the plaintiff.

VII Even though the alleged inauguration took place on 13.11.1999, the board of Aakashkrupa was still in the suit premises on the date of the suit which is seen as per the photographs produced by the defendant and as per commissioner's report the board of the plaintiff's business was still in the suit shop. This is against the natural human conduct.

VIII. The circumstance is on record that the defendant entered into an agreement on 23.9.1999 for the sale of suit premises to third party for Rs.10,11,000/-. The argument of Mr. Shah that his client was rented premises on 4.11.1999 and his client is not supposed to know why the landlord was required to sell the premises subsequently. But the said circumstance is not subsequent to 4.11.1999 but it is prior to that date. We have already discussed that we are not concerned with legality or otherwise of the transaction between the defendant and third party. At this stage, there is no reason why the said circumstance, namely, that some kind of agreement was entered into between the defendant and third party on 23.9.1999, should not be believed. It will reflect the intention of the defendant and then the defendant intended and entered into such agreement, the natural course of hR

let the premises to third person.

After summarizing above reasons, the Appellate Bench held that (i) the petitioner had failed to establish prima-facie case that he was in possession of the suit shop as a tenant; (ii) no irreparable loss was going to be caused to the petitioner; (iii) balance of convenience was also not in his favour and, therefore, the trial court had committed error in appreciating the facts and circumstances of the case and had illegally interfered with the possession of the defendant on the strength of Court Commissioner's report. The Appellate Bench has granted the prayer made by the respondent in her written statement-cum-counter claim by holding that the suit filed by the petitioner was an abuse of process of the Court and directed the petitioner to remove his garments and other articles lying in the suit shop relating to his alleged business and hand over the vacant and peaceful possession along with keys to the respondent. The said order of the Appellate Bench in Appeal from Order No.20

of 2000 has been challenged by the original plaintiff in this Court by filing this Civil Revision Application under Section 29(2) of the Act.

9. At the request of learned advocates for respective parties, this court had called for Record and Proceedings from the Courts below so as to finally dispose of this Civil Revision Application at the admission stage.

10. Learned counsel, Mr. S.M.Shah, for learned advocate Mr. Ketan D. Shah for the petitioner, has vehemently submitted that the Appellate Bench has erred in interfering with the findings recorded and the interim injunction granted by the trial court. It is submitted that the powers of the Appellate Court under Order 43 Rule 1 of the Code are very limited, and, as the trial court has exercised its discretion properly, the Appellate Bench ought not to have interfered with the discretionary order of injunction granted under Order 39 Rule 1 of the Code. The learned advocate for the petitioner, in support of the above contention, has placed reliance on the decisions in the cases of (i) Wander Limited and another vs. Antox India P. Ltd. reported in 1990 (Supplementary) SCC p.727, (ii) N.R.Dongre and others vs. Whirlpool Corporation and another, reported in (1996) 5 Supreme Court Cases 714, (iii) Bureau of Indian Standard vs. Western India Engineering Company, reported in 1998 (2) G.L.H. 863. Learned advocate Mr. S.M. Shah, in support of his contention that the party in possession should not be disturbed without due process of law and his possession should be protected during pendency of the trial, has placed reliance on the decisions in the cases of (i) Ranjankumar Vanmanrao Nandker vs. Sarvajanik Hindu Dharashala, reported in 1985 GLH (UJ) 56, (ii) Smt. Rajnibai @ Mannubhai vs. Smt.Kamla Devi & Others, reported in JT 1996 (1) SC 706, (iii) Prataprai N. Kothari vs. John Braganza, reported in AIR 1999 Supreme Court 1666, (iv) Molar Mal vs. M/s. Kay Iron Works (P) Ltd, reported in AIR 2000 Supreme Court 1261, and (v) Badri Prasad vs. The State of Madhya Pradesh, reported in AIR 1970 Supreme Court 706. The learned counsel for the petitioner, therefore, submitted that the present Civil Revision Application be allowed and the impugned judgment and order of the Appellate Bench be quashed and set aside.

11. On the other hand, the learned counsel Mr. M.B. Gandhi for learned advocate Mr. R.M. Agarwal for the

respondent, has submitted that the trial court did not appreciate the documentary evidence produced by the respondent and had granted injunction only relying upon the ex-parte report of the Court Commissioner and the affidavits produced by the petitioner. It is further submitted by the learned advocate for the respondent that the order of the trial court was, ex-facie, illegal and, therefore, the Appellate Court was justified in interfering with the same. The learned advocate for the respodnent has further submitted that no injunction could be granted in favour of a trespasser and against the true owner. It is further submitted by the learned advocate for the respondent that the trial court had, without recording a prima face case, granted injunction in favour of the petitioner without appreciating the fact that the petitioner was not in settled possession in the suit shop. It is further submitted by the learned advocate for the respondent that the petitioner had failed to establish prima facie case that he was tenant of the suit shop. The learned advocate for the respodnent has further submitted that the trial court had not followed the settled principles of law for granting injunction and the Appellate Court was justified in interfering with the said order and, therefore, the present Civil Revision Appplication be dismissed.

12. I have considered the contentions raised at the Bar and the evidence on record. The question, which requires to be considered in the present case, is whether the petitioner has, prima facie, established that his possession is legal, i.e. as a tenant, and his possession is settled. The Supreme Court, in the case of Munshi Ram and others vs. Delhi Administration, reported in AIR 1968 Supreme Court 702, had an occasion to deal with the question relating to powers of a true owner to dispossess a trespasser who was not in a settled possession. In paragraph 14, at page 705, it is observed by the Supreme Court as under:

"It is true that no one including the true owner has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such case unless he is evicted in due course of law he is entitled to defend his possession even against his original owner. But stray or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be a settled possession extending over a sufficiently long period and acquiesced in by the true owner. A casual act of possession would

not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and reinstate himself provided he does not use more force than necessary. Such entry will be viewed only as a resistance to any intrusion upon possession which has never been lost. The persons in possession by a stray act of trespass, a possession which has not matured into settled possession, constitute an unlawful assembly, giving right to the true owner, though not in actual possession at the time to remove the obstruction even by using necessary force."

13. The trial court, while granting ad-interim injunction had only appreciated that there was a dispute with regard to possession between the petitioner and the respondent and the report of the Court Commissioner indicated that the petitioner was found in possession of the suit shop at the time of carrying out local inspection of the suit shop. As per the petitioner's own case, a tenancy was created on November 10, 1999 and he had held opening ceremony of the suit shop on November 13, 1999, whereas the present suit is filed on November 22,1999. It means that within 12 days of creation of so-called tenancy, the petitioner has filed suit and claimed reliefs mentioned earlier. The claim of the petitioner that he is tenant of the suit shop is seriously contested by the respondent. Possession of the suit shop for 12 days cannot be construed to mean that the petitioner is in settled possession of the suit shop and that too acquiesced in by the respondent. The petitioner had produced affidavits of his relatives and of the persons of his choice in support of his case that the opening ceremony was held on November 13, 1999 and has also produced a copy of the invitation card of the opening ceremony. As against that, the respondent had produced affidavits of independent persons who own shops adjoining the suit shop indicating that the suit shop was already sold by an agreement and no such opening ceremony was held on November 13, 1999. The learned trial judge had not given a specific finding that there was a prima facie case in favour of the petitioner. The learned trial judge has only recorded a finding that there is a word against word and the issue about the possession is triable. The learned trial judge had not focussed his attention to the documentary evidence led by the respondent and the same is ignored. In Shree Jain Swetambar Terapanthi Vid(S) vs. Phundan Singh and others, reported in (1999) 2 Supreme Court Cases 377 (=AIR 1999 Supreme Court 2322), the Supreme Court, while considering the scope of interference by the Appellate Court under Order 39 Rule 1 in a matter of injunction

issued under Order 39 Rule 2 of the Code, has held that:

"Where the trial court has granted temporary injunction without recording its prima facie satisfaction on merits, it is incumbent upon the Appellate Court to go into the question of merit and set aside the trial court's o.R

but the Appellate Court, without discussing material on record and without recording a contrary finding, cannot set aside the order of the trial court holding that the trial court has gone wrong in recording the prima facie satisfaction nor set aside that finding on the basis of the material on record without considering the relevant material only because the tricl court has erroneously reached the finding or conclusions on the facts established."

14. An interference of the Appellate Court with the order of the trial court can be said to be justified in the following cases:

1. Where the lower Court acts arbitrarily or perversely or capriciously.
2. Where the lower Court acts in disregard of sound legal principles.
3. Where it acts without considering all the relevant records proceeds on assumptions not borne out or justified by the records.
4. Where the discretion has been exercised where it ought not to have been exercised.
5. Where the Judge misdirects himself by wrongly assuming that there is no general rule to guide him in the exercise of his discretion.
6. Where the discretion which is vested in the Judge and which he ought in law to exercise has not been exercised at all.
7. Where the finding of the lower Court is manifestly erroneous.
8. Where the finding is unsatisfactory or is based on no evidence or is not justified on a correct assessment of facts and proceeds rather on superficial view of the evidence.
9. Where the finding is opposed to the weight of evidence.

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the conduct of parties, effect of documents or the weight of probabilities, reduce the value of the opinion of the Judge.

If the order of the trial Court is viewed from the above principles, in my opinion, the Appellate Court was justified in interfering with the findings and discretion of granting injunction in favour of the petitioner. In my opinion, the Appellate Court, in its judgment, has, elaborately, dealt with the documentary evidence led by both the parties and has correctly evaluated it in light of the facts and circumstances emerging from the record. The conclusions summarized by the Appellate Court at page 18 of its judgment, are based on proper appreciation of evidence led by both the parties.

15. As noted earlier, in my opinion, the trial court has not taken into consideration in right perspective the documentary evidence produced by the respondent in support of the case that, because of good relations between the parties, the petitioner, even in absence of the husband of the respondent, was opening the suit shop and was taking part in the clearance sale which was held from November 4, 1999. The petitioner himself had supplied ready-made garments of huge amount to the husband of the respondent. One set of keys of the suit shop was handed over to the petitioner for opening the suit shop and to take active part in the clearance sale. The petitioner knew that the suit shop was already agreed to be sold to Smt. Linaben Vijaybhai Vora by agreement to sell executed in September 23, 1999. It would not be out of place to note that, taking advantage of the situation, the petitioner cooked up a story of having become tenant of the suit shop and, by filing the suit and obtaining ex-parte order of appointment of Court Commissioner, has tried to make out a case that he was in possession of the suit shop and the signboard 'Allwear Creations' was also found at the suit shop. Even though the goods belonging to the respondent were found in the suit shop, the Court Commissioner has not noted in his report of local inspection of the suit shop which was carried out ex-parte without good reason. The photographs produced by the respondents relating to the suit shop show that there was signboard of Aakashkrupa, the trade name under which the husband of the respondent was carrying on business, which the Court Commissioner has not noted in his report at all. As per the case of the petitioner, he became tenant on November 10, 1999. The agreement to sell was executed on September 23, 1999. In my opinion, no landlord would, after executing an agreement to sell, would induct a person as a tenant of the suit shop. The chain of events which have taken place from September 1999 to November 4, 1999, indicates

that the respondent and her husband had already sold away the suit shop by executing agreement to sell and, thereafter, had given a public advertisement for clearance sale of the ready-made garments but as the petitioner had supplied huge quantity of ready-made garments to the husband of the respondent, he was also interested in getting back his money out of the clearance sale and, therefore, one set of keys of the suit shop was handed over to him so that he could open the shop and start clearance sale even in absence of the husband of the respondent. The fact that the signboard of the petitioner's trade name 'Allwear Creations' was found lying inside the suit shop indicates that, till November 22, 1999, when the Court Commissioner had carried out the inspection of the suit shop, his sign board was not placed outside the suit shop, and the petitioner had made out a show of having already started business in the name of 'Allwear Creations' in the suit shop. The sales-tax registration certificate produced by the petitioner also does not relate to the suit shop but therein address of residence of the petitioner is mentioned. The affidavits produced by the petitioner were of his close relatives and no affidavit of any independent person was filed in support of the application Exh.5 for interim injunction. On the other hand, the respondent has produced affidavits of owners of the nearby shops indicating that no such opening ceremony was held on November 13, 1999 of the business of the petitioner in the suit shop. In my opinion, no prima facie case was made out by the petitioner to establish that his possession in the suit shop was legal and more particularly in the capacity of a tenant. The petitioner had, by taking advantage of the relations with the family members of the respondent, tried to make out a false case of acquiring tenancy rights of the suit shop and tried to grab possession of the suit shop. At the most the possession of the petitioner can be said to be permissive and cannot be called 'settled or legal possession'.

16. In Prataprai. N. Kothari vs. John Braganza, A.I.R. 1999 S.C., 1966, on which reliance is placed by learned counsel for the petitioner, the suit claim was based on plea of long and exclusive possession and not on title. In the above case, the defendant had not raised plea that he had title to the suit property. In the above circumstances, the Supreme Court held that dismissal of the suit on the ground that defendant had proved his title to the suit property and on doctrine that possession follows title was improper, even though the defendant has not raised a plea that he has title to

the suit property. In my view the decision in Prataprai N. Kothari's case (supra) will not apply to the facts of this case. The petitioner has not based his claim over the suit shop on the plea of long and exclusive possession. As per his case, he had only acquired right of tenancy in the suit shop on November 10, 1999, and the suit came to be filed on November 22, 1999. The possession of the petitioner cannot be called long and exclusive because as per the report of the Court Commissioner, the goods of the respondents were also found in the suit premises.

17. The reliance placed by learned counsel for the petitioner on the decision reported in the case of Rana Ranjankumar Vamanrao Nandker vs. Sarvajanik Hindu Dharmashala, reported in 1985 G.L.H. (U.J.). 56 will also have no application to the facts of this case. In the above case, the petitioner was found to be in exclusive possession of the suit shop as a tenant. It be mentioned that present petitioner had failed to establish his tenancy rights over the suit land and had also not established that he was in exclusive possession of the suit shop. No rent receipts were produced and no satisfactory evidence was produced indicating that the petitioner was in exclusive possession of the suit shop particularly in the capacity of a tenant.

18. Learned counsel for the petitioner incidently submitted that as the petitioner is protected by the Court's order since more than 1 year and 4 months, he should be protected by this Court till the final disposal of the suit. In my view, the petitioner who has come before the Court claiming to be a tenant of the suit shop and having failed to prima facie establish his rights over the suit shop as a tenant, he has no right to obtain an injunction to protect his possession. The Apex Court in the case of Premji Ratansey Shah and others vs. Union of India, 1994 (5) SCC,547 had clearly taken the view that grant of injunction and equitable relief is discretionary. Ordinarily no injunction can be granted in favour of a trespasser or a person who gained unlawful possession as against the true owner. A person must show his personal interest in the property and when the Court found in the case before it that the person had no title whatsoever over the suit land as against the owner, the Apex Court held that no injunction can be granted. In paragraphs 4 and 5 of the reported judgment, the Apex Court made the following observations and laid down the principle on the subject.

"Issuance of an order of injunction is absolutely a discretionary and equitable relief. In a given set of facts, injunction may be given to protect the possession of the owner or person in lawful possession. It is not mandatory that for mere asking such relief should be given. Injunction is a personal right under Section 41(j) of the Specific Relief Act, 1963; the plaintiff must have personal interest in the matter. The interest of right not shown to be in existence, cannot be protected by injunction.
It is equally settled law that injunction would not be issued against the true owner. Therefore, the Courts below have rightly rejected the relief of declaration and injunction in favour of the petitioners who have no interest in the property. Even assuming that they had in possession, their possession is wholly unlawful possession of a trespasser and an injunction cannot be issued in favour of a trespasser or a person who gained unlawful possession as against the owner. Pretext of dispute of identity of the land should not be a case to claim injunction against the owner."

In Ramesh Devchand Pala v. Jayantkumar Gordhandas Madani & Ors, 1998 (1) G.L.H. 610 on which reliance is placed by learned counsel for the respondent, the learned single Judge has laid down the principle that under Section 6 of the Specific Relief Act, 1963, the Court has ample powers to grant interim relief for restoration of possession by directing to dispossess the possession which existed immediately before filing of the suit i.e. before alleged act of removal by unlawful means. The party was only required to establish legal possession and if he succeeds in doing so, he would be entitled to decree of restoration for possession from the defendant who has dispossessed him. In the present case, by filing counter claim, the respondent had successfully established that his previous possession was legal and the petitioner by unlawful means had tried to protect him as a tenant of the suit shop which attempt of the petitioner was not well founded. The object is to check the tendency of recovery of possession of the property by taking law in hands.

19. In my opinion, it cannot be said that the Appellate Court has exceeded its jurisdiction when it has disturbed the finding of the trial court in granting injunction in favour of the petitioner. It may be noted that the petitioner has failed to establish his possession either as of right or as tenant of the suit premises because he was merely permitted to use the suit

shop for a limited purpose. No prima facie case was made out that the petitioner was tenant of the suit premises and he was in legal possession. When the goods of the respondent were found in the suit shop and when the signboard of Aakashkrupa' was already displayed outside the suit shop, the petitioner could not have been in legal possession of the suit shop. The show created by the petitioner that he had held opening ceremony of the suit shop on November 13, 1999 was also prima facie not proved. The petitioner was not in settled possession of the suit shop. In my view, no case was, prima facie, made out by the petitioner so as to entitle him to grant of interim injunction in his favour protecting his possession of the suit shop. The facts emerging from the evidence produced by the respondent, on the contrary, has probabilised the case put up by the respondent that the keys of the suit shop were handed over to the petitioner and, taking advantage of the situation, he had obtained an ex-parte order of appointment of Court Commissioner and had shown his possession by putting up his sundry articles in the suit shop. The acts of the petitioner cannot be called or construed as possession of the suit shop in the real sense. The trial Court had not considered the evidence led by the parties properly and, therefore, the Appellate Bench was justified in interfering with the order of the trial Court.

20. The learned advocate for the petitioner, next, submitted that the Appellate Bench has seriously erred in passing the order directing the petitioner to remove his garments and other articles pertaining to his business from the suit shop and hand over vacant and peaceful possession along with keys to the respondent. According to the learned advocate for the petitioner, such a direction was wholly unjustified because the Appellate Bench had no jurisdiction to evict a person without due process of law. The learned advocate for the petitioner, further, submitted that, even if the respondent had lodged counter claim in the suit, it did not fulfill the requirement of Order 8 Rule 6A of the Code, and, as full court fee was not paid on the counter claim as per the provision of Section 5 of the Bombay Court Fees Act, 1959, the counter claim could not have been entertained.

21. In my opinion, none of the submissions raised by the learned advocate for the petitioner can be accepted. In Exh.16, which was written statement-cum-reply to the ad-interim injunction application and also counter claim, court fee of Rs.2.50 ps was affixed. The defect of insufficieint stamp does not render the application

inherently invalid. Under Section 40 of the Bombay Court Fees Act the defect of insufficient stamp is curable by making further payment at a subsequent stage. The direct consequence is that the defect does not make the counter claim entirely invalid. The petitioner has filed the suit claiming that his possession as tenant of the suit shop may not be disturbed and, on that basis, he has sought a permanent injunction against the respondent. By filing counter claim in the said suit, the respondent, in paragraph 13, has prayed that the petitioner be directed to remove his goods from the suit shop and the petitioner and his agents be restrained by an order of injunction from entering the suit shop. In my opinion, such a counter claim is maintainable under Order 8 Rule 6A of the Code. The counter claim set up by the respondent cannot be thrown on the ground that no proper court fee was payable. At the most, the Court can issue a direction to ascertain proper amount of court fees to be paid on such counter claim and recover deficit court fee, if any.

22. The submission of learned counsel for the petitioner that the counter claim was not properly valued and court fee on the market value of the suit shop was not paid and, therefore, under Section 5 (1) of the Bombay Court Fees Act, 1959, the Appellate Bench ought not to have considered the reliefs prayed in the counter claim, deserves to be rejected. When the respondent had filed counter claim in the suit filed by the petitioner praying inter-alia to restore the possession of the suit shop and issuing counter injunction against the petitioner from entering the suit shop with a direction to remove all his goods from the suit shop, it would be open for the trial Court to revive and to ascertain the correct market value of the suit shop and to direct the respondent to pay proper court fees under Section 8 and 14 of the Bombay Court Fees Act, 1959. Still the suit is not finally disposed and the trial Court has ample jurisdiction and power to recover deficit court fees by ascertaining correct valuation of the counter claim.

23. There are two stages on which question of proper valuation of the court fees falls and required to be decided, one when a complaint is sought to be presented and other at a subsequent stage, after the plaint is admitted. Where any such dispute or difference about amount of court fees payable arises, subsequent to the admission of the plaint, either by a contention in this behalf raised by the defendant or by the Court suo-motu, or by the plaintiff on the ground that he has paid excess court fees, the Court has ample power to decide the

question and raised the valuation. Under Section 8 of the Bombay Court Fees Act, the Court is empowered to hold an inquiry if it thinks fit for that purpose. It is not the case of the petitioner that he had objected before the trial Court that the counter claim filed by the respondent was undervalued or no proper court fee was paid. The contention sought to be raised by learned counsel for the petitioner is for the first time raised in this revision application. The said contention can be raised by the petitioner at the trial of the suit and if the Court finds that the counter claim is not properly valued and no proper court fees are paid, it can raise the issue and after ascertaining the market value of the suit shop, can direct the respondent to pay deficit court fee. The Court has ample power to recover the deficit amount of Court fee, if ultimately finds that no proper court fees are paid on the counter claim. There are sufficient provisions made in the Bombay Court Fees Act, 1959, to recover the amount of deficit court fee, if the Court or Taxing Officer finds that no proper court fee is paid. Therefore, the submission of the learned counsel for the petitioner that as no proper court fee was paid on the counter claim, it should not have been entertained in view of Section 5 of the Bombay Court Fees Act, 1959, deserves to be rejected.

24. Incidentally, it was submitted by the learned advocate for the petitioner that, to remove the petitioner from the suit shop and directing him to remove his goods from the suit shop, would be a suit against a trespasser for which the Small Causes Court has no jurisdiction and appropriate forum for filing such a suit is ordinary Civil Court and, therefore, direction to the petitioner to remove the goods from the suit shop and restrain him and his agents from entering the suit shop could not have been passed or such an injunction could not have been granted by the Small Causes Court having no jurisdiction over the subject matter.

25.. The learned advocate for the respondent, in reply to the above submissions of the learned advocate for the petitioner, has placed reliance on the judgment of the Supreme Court in the case of Jag Mohan Chawla and another vs. Dera Radha Swami Satsang and others, reported in AIR 1996 Supreme Court 2222, wherein, the Supreme Court held as under:

"In a suit for injunction, counter-claim for injunction in respect of the same or a different property is maintainable. A defendant can claim any right by way of a counter-claim in respect of any cause of action that

has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit. In sub-rule (1) of Rule 6A, the language is so couched with words of wide width so as to enable the parties to bring his own independent cause of action in respect of any claim that would be the subject matter of an independent suit. Thereby, it is no longer confined to money claim or to cause of action on the same nature as original action of the plaintiff. It need not relate to or be connected with the original cause of action or matter pleaded by the plaintiff. The words 'any right or claim in respect of a cause of action accruing with the defendant' would show that the cause of action from which the counter-claim arises need not necessarily arise from or have any nexus with the cause of action of the plaintiff."

The learned advocate for the respondent has also placed reliance on an unreported decision of the learned single Judge of this Court (Coram: S.D. Dave, J.) in Civil Revision Application No.1206 of 1994, decided on July 17. 1995. In the above Civil Revision Application, the plaintiff claimed to be tenant over a premises comprising Room No.24 of Dharamashala situated in Ahmedabad, which was a registered public trust. The plaintiff was a rightful tenant in respect of some other premises bearing Room No.22. For the beneficial use and enjoyment of the above said premises, he wanted to have the additional premises in form of Room No.24 on rent. As per the procedure of the Trust, the Advisory Committee of the Trust was required to process proposal and to advise the Executive Committee regarding the same. The Advisory Committee had put forward the proposal of accepting the plaintiff as tenant in respect of Room No.24. However, the Executive Committee of the District Panchayat refused to grant approval accepting the plaintiff as tenant of Room No.24. The plaintiff filed a suit for a dual relief in the Small Causes Court in form of a declaration that, he is the tenant in respect of Room No.24 of the Dharamashala property and for a permanent injunction restraining the defendant from taking possession of the premises under dispute without due process of law. The Small Causes Court came to the conclusion that the plaintiff was able to establish his right qua Room No.24 also and declared him tenant and prevented the Trust from dispossessing the plaintiff without due process of law. The matter was carried before the Appellate Bench of the Small Causes court, Ahmedabad, wherein, the Appellate

Bench held that, all that was done by the Advisory Committee was in anticipation of an approval or the ratification by the Executive Committee and as it has not been done, there cannot be said to be a concluded contract between the parties under which the plaintiff can successfully urge that he has became the tenant in respect of the premises under dispute. The Appellate Bench dismissed the suit filed by the plaintiff. The matter was carried to the High Court by filing Civil Revision ApplicationNo.120 of 1994. In the above Civil Revision Application, an argument was advanced that, when the plaintiff was in possession of the disputed premises, he cannot be evicted without due process of law. The learned single Judge, while negativing the above submission, held that, when the plaintiff had already gone to the competent Court with a prayer for a declaration that he is the tenant in respect of the disputed premises and when he wanted to urge that he is tenant in respect of the disputed premises and he wanted to urge that, as he is tenant in respect of the disputed premises also, he cannot be dispossessed without due process of law. When the plaintiff himself had put the law in motion by filing the suit and, ultimately, he fails, it cannot be said that the other side would be taking the possession without the due process of law. It is, indeed, true that the process of law in the instant case has been initiated by the petitioner-plaintiff himself. But, when his case fails, he cannot urge that now a due process of law should be reinstituted by the other side.

26. The decision of the Apex Court in Jag Mohan Chawla (supra) and the decision rendered by the learned single Judge in Civil Revision Application No.1206 of 1994, in my view, squarely cover and give a complete answer to the contention raised by the learned advocate for the petitioner that the Appellate Court has exceeded its jurisdiction in directing the plaintiff to hand over the vacant and peaceful possession of the suit shop to the defendant and further restraining him and his agents from entering the suit shop. The case of the respondent is further strengthened when the respondent had put up the counter claim and had prayed to issue injunction against the petitioner on the ground that he had not become tenant of the suit shop and he should be restrained from entering the suit shop and he should be directed to remove all his goods from the suit shop. In view of the counter claim lodged by the respondent, the Appellate Court has not committed any error in allowing counter claim and directing the petitioner to remove all his goods and further restraining him from entering the

suit shop. In my opinion, no illegality or material irregularity is found to have been committed by the lower appellate court.

27. The Supreme Court, in the cases of Patel Valmik Himatlal vs. Patel Mohanlal Muljibhai, (1998) 7 Supreme Court Cases 383, and Girdharbhai vs. Saiyed Mohmad Mirasaheb Kadri, reported in AIR 1987 Supreme Court 1782, has laid down that powers of the High Court under Section 29(2) of the Rent Act are revisional powers with which the High Court is clothed. It empowers the High Court to correct errors which may make the decision contrary to law and which errors go to the root of the decision, but it does not vest the High Court with the power to rehear the matter and reappreciate the evidence. The mere fact that a different view is possible on reappreciation of the evidence cannot be a ground for exercise of the revisional jurisdiction. The High Court cannot substitute its own findings on a question of fact for the findings recorded by the courts below on reappraisal of evidence. In my view, the judgment and order of the Appellate Bench of the Small Causes Court, Ahmedabad, does not suffer from any error of law and is based on sound principles of granting or refusing discretionary relief of injunction, as propounded by the Apex Court.

28. As a result of foregoing discussion, this Civil Revision Application fails and is hereby dismissed with no order as to costs. The order of status-quo granted on September 4, 2000, is vacated.

May 4, 2001 (M.H.Kadri, J.)

29. After pronouncement of the judgment, learned advocate Mr. Tushar Mehta, on behalf of Mr. Ketan Shah for the petitioner, has requested to stay operation of this judgment for eight weeks, as the petitioner wants to approach the higher forum. Learned advocate, Mr. M.B. Gandhi, for learned advocate Mr. R.M. Agarwal for the respondent, has vehemently opposed to grant of the request of the learned advocate for the petitioner and has submitted that, when the Court has found that the possession of the petitioner is not legal one, he is not entitled to remain possession of the suit shop.

30. Since the petitioner wants to challenge the judgment and order in the higher forum, operation of this judgment and order is stayed for two weeks from today.

May 4, 2001 (M.H. Kadri, J.)
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